No. 56856-0-II

THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TROY RESTVEDT,

Appellant.

Appeal from the Superior Court of Washington
for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
Office ID 91182
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Other States Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

I. RESTATEMENT OF THE ISSUES

A. Did the State present sufficient evidence to sustain the jury's finding of guilt for Unlawful Factoring of Credit Card or Payment Card Transaction in counts three through eight?

B. The State concedes Restvedt's double jeopardy was violated and five of the six counts Unlawful Factoring of Credit Card or Payment Card Transaction must be remanded, vacated, and dismissed with prejudice.

C. Did the trial court abuse its discretion when it ruled Restvedt's proposed cross-examination of the victim was outside the scope of ER 608(b)?

D. Did the deputy prosecutor commit prosecutorial error in closing arguments by questioning the lack of evidentiary support for Restvedt's version of the events?

E. Is there cumulative error requiring reversal?

II. STATEMENT OF THE CASE

Jessica Stirling owns and manages properties for a living, including properties she currently holds in Lewis County. RP 88. Ms. Stirling returned to Lewis County in 2016, after living in Portland and working as a property

manager. RP 90. Ms. Stirling moved to her childhood home in Onalaska, with her boyfriend at the time, Restvedt. RP 89-90. OnPoint and Restvedt had plans for sustainable living and starting a business together. RP 90. Ms. Stirling had a bank account with OnPoint Credit Union (OnPoint), and was the only one in the relationship with bank accounts. RP 90-91. Ms. Stirling used a debit card from this account. RP 91. Restvedt had access to a debit card on Ms. Stirling's OnPoint account. RP 91.

Ms. Stirling and Restvedt supported themselves on the money Ms. Stirling had in savings, money she earned from an Etsy store, and occasional construction jobs Restvedt did under the table. RP 91, 187, 218-19, 237, 265. There was no rental income at that time. RP 92. According to Ms. Stirling the relationship was not an equal partnership, "I was the one with the account. I was the one with the homes. I was the one with the money." RP 93. Ms. Stirling explained that she would find her debit card

missing, then later she would check her bank account and there would charges that she did not make. RP 93. Restvedt knew Ms. Stirling's PIN number because he would watch her enter it at the ATM or she would hand him the card and give him the PIN number to withdraw cash when they were at the drive-thru ATM. RP 98.

Ms. Stirling and Restvedt's relationship lasted four years, ending in April 2020 after a volatile confrontation. RP 95, 270. After the breakup, Ms. Stirling looked over her bank statements. RP 95. According to Ms. Stirling, she discovered a very large withdrawal from her account that she did not know about. RP 95; Ex. 1, 2.[1] Ms. Stirling later asked Restvedt where her debit card was. RP 95. Restvedt patted his pockets, came to his breast pocket, removed the debit card, and handed it back to Ms. Stirling. *Id*. Ms. Stirling asked Restvedt, "Why did you take the money from

[1] The State is submitting a supplemental designation of Clerk's papers to include Exhibits 2 and 4, therefore it will simply cite the exhibits as Ex. 2 and Ex. 4.

my account?" *Id*. Restvedt replied, "That was your asshole tax." *Id*.

Ms. Stirling obtained the bank statements because she found a number of unknown charges on her account. RP 96. Ms. Stirling looked over the bank statements, went through the history, and noticed a number of charges she had not made. *Id*. Ms. Stirling called OnPoint and informed them she believed that she was a victim of fraud. *Id*. OnPoint assisted Ms. Stirling to figure out what she should do regarding the charges Ms. Stirling did not make. *Id*. Ms. Stirling went through her statements, making an 'X' on the transactions she knew were fraudulent. RP 98-99; Ex. 1

There were numerous transactions at certain mercantile establishments that Restvedt frequented, such as the Buck Stop, a convenience store in Silver Creek. Ex. 1; RP 105-16. There were other transactions, Chevron in Morton, the Black Lake Grocery in Olympia, Gene and Barbs in Randle, withdrawals at Umpqua Bank and

Security State Bank, and more, that Ms. Stirling asserted Restvedt made without her permission. Ex. 1, 2; RP 105-37.

Ms. Stirling contacted law enforcement and reported the thefts and improper use of her debit card. RP 136, 145, 234. As a result, the State charged Restvedt with one count of Theft in the Second Degree, one count of Unlawful Factoring of Credit or Payment Card Transaction First Violation, and eight counts of Unlawful Factoring of Credit or Payment Card Transaction Second or Subsequent Violation. CP 1-9. All counts carried an allegation that they were committed against an intimate partner. Id. Restvedt elected to try his case to a jury. *See* RP.

The testimony elicited at trial was consistent with the above. Restvedt testified, asserting he only used Ms. Stirling's debit card with her permission. RP 271, 275. Restvedt countered Ms. Stirling's characterization of their relationship, drawing a picture of two individuals in a

partnership trying to build something together. RP 262-70. Restvedt denied taking the $400 from Ms. Stirling without her permission. RP 281-82. Restvedt also asserted Deputy Humphrey's testimony that Restvedt admitted he took the money without permission was false. RP 282.

Restvedt was convicted of Theft in the Second degree and six counts of Unlawful Factoring of Credit or Payment Card Transaction (counts 3 through 8), all with a special circumstances that the crime was against an intimate partner. CP 41-42, 45-56. Restvedt was found not guilty of three counts, 2, 9, and 10. CP 43, 57, 59. Restvedt was sentenced to 6 months in jail. CP 67-71. After a motion for a revision of the sentence, the trial court agreed to allow Restvedt to serve electronic home monitoring. CP 84-97. Restvedt timely appeals his conviction and sentence. CP 72.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICTS THAT RESTVEDT COMMITTED UNLAWFUL FACTORING OF CREDIT CARD OR PAYMENT CARD TRANSACTION AS CHARGED.

There was sufficient evidence presented to show beyond a reasonable doubt that Restvedt committed Unlawful Factoring of Credit Card or Payment Card Transactions, as charged and convicted in Counts 3 through 8. Contrary to Restvedt's assertion, RCW 9A.56.290(1)(a) applies to his conduct in this matter. Appellant's Opening Brief (AOB) at 9-19. Further, the evidence presented, taken in the light most favorable to the State, sustains all of the essential elements of the charged and convicted offenses. The Court should affirm the jury's verdicts.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could

have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Homan,* 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

2. There Was Sufficient Evidence Presented That Restvedt Committed Unlawful Factoring Of Credit Card Or Payment Card Transaction.

The State proved Restvedt committed six counts of Unlawful Factoring of Credit Card or Payment Card Transaction. The plain language of the statute supports the jury verdicts for Counts 3 through 8. The evidence presented satisfied the statutory elements.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L. Ed. 2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences

therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Restvedt of Unlawful Factoring of Credit Card or Payment Card Transaction, the State was required to prove, beyond a reasonable doubt, that Restvedt "use[d] a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on a payment card without the permission of the authorized user of the payment card or with the intent to defraud the authorized user, another person, or a financial institution." RCW 9A.56.290(1)(a); CP 2-9. The to-convict jury instructions mirrored the statutory language. CP 22-27 (Instructions 7-12); RCW 9A.56.290(1)(a).

Restvedt asserts that the evidence presented to the jury in this matter does not comport with the statutory elements of RCW 9A.56.290(1)(a). AOB at 14-19. Restvedt argues factoring only applies to unlawful transactions by merchants or commercial agents to stop them from defrauding financial institutions by passing of illegitimate transactions as legitimate business. AOB at 15-

18. The plain language of the statute does not support Restvedt's interpretation, and therefore, the evidence presented does comport with the statutory elements of RCW 9A.56.290(1)(a).

The primary goal of statutory interpretation is to determine the drafter's intent. *State v. Van Wolvelaere,* 195 Wn.2d 597, 600, 461 P.3d 1173 (2020). "The surest indication of that intent is the" plain language of the text provision in question. *Van Wolvelaere,* 195 Wn.2d at 600; *State v. Dennis,* 191 Wn.2d 169, 172, 421 P.3d 944 (2018). If the text of the statute is clear, the Court's analysis stops. *Van Wolvelaere,* 195 Wn.2d at 600. If the statute is ambiguous, the inquiry continues. *Id.* When conducting statutory analysis, courts look to the plain language in the statute by considering four things related to the provision at question: 1) the provision's actual text, 2) "the context of the statute where the provision is found," 3) any related provisions, and (4) the entire statutory scheme. *State v.*

Dennis, 191 Wn.2d 169, 172-73, 421 P.3d 944 (2018). (internal quotations and citations omitted).

A statute is ambiguous if, after conducting the inquiry, "there is more than one reasonable interpretation of the plain language." *Dennis,* 191 Wn.2d at 173. More than one conceivable interpretation does not make a statute ambiguous. *Id.* If a statute is ambiguous, the court "may rely on principle of statutory construction, legislative history, and relevant case law to discern legislative intent." *Id.*

There is nothing in the plain language of subsection (1)(a) of RCW 9A.56.290 that allows a person to commit unlawful factoring under a set of circumstances where that person is using a scanning device. A person is defined as, "an individual, partnership, corporation, trust, or unincorporated association, but does not include a financial institution or its authorized employees, representatives, or agents." RCW 9A.56.280(12). A

scanning device is defined as, “a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a payment card.” RCW 9A.56.280(15). Finally, a debit card is a payment card. RCW 9A.56.280(11).

Restvedt cites to Division Three’s unpublished opinion in *State v. Jensen*, COA No. 32607-1-III, 193 Wn. App. 1020 (Apr. 12, 2016)(unpublished),[2] to support his argument that RCW 9A.56.290(1)(a) does not apply in circumstances when one person takes another person’s credit card. AOB at 15-18. In *Jensen*, the Court reviewed comparability of Oregon’s fraudulent use of a credit card statute to RCW 9A.56.290. The Oregon statute criminalized a person’s use of a credit card, “with intent to injure or defraud,” and “uses the credit card for the purposed of obtaining property or services with the

[2] Cited pursuant to GR 14.1 for persuasive authority.

knowledge that, (1) the card is stolen or forged; or (2) revoked or canceled," or (3) any other reason it is not authorized by the person who the card is issued to or the issuer. *Jensen,* 32607-1-III at 7.

Restvedt cites with authority the *Jensen* court's rejection of comparability between the Oregon statute and RCW 9A.56.290. Arguing that the *Jensen* court reviewed the comparability of the "Washington's transactions factoring statute, which in 2002 provided, at RCW 9A.56.290(1)(a), that it is a felony for a person to [use] use a scanning device to access, read, obtain, memorize, or store…" AOB at 15, *citing Jensen,* 32607-1-II at 5; former RCW 9A.56.290(1)(a). Yet, this is not the former version of RCW 9A.56.290 found in Laws of 1993, ch. 484, § 2, and the *Jensen* court addresses this, as discussed further below. Further, RCW 9A.56.290 has substantively only

been amended once, in 2003. Laws of 2003, ch. 52, § 2.[3]

As originally enacted, the statute read:

> (1) A person commits the crime of unlawful factoring of a credit card transaction if the person, with the intent to commit fraud or theft against a cardholder, credit card issuer, or financial institution, causes any such party or parties to suffer actual monetary damaged in the aggregate exceed one thousand dollars, by:
>
> (a) Presenting to or depositing with, or causing another to present to or deposit with, a financial institution for payment a credit card transaction record that is not the result of a credit card transaction between cardholder and the person;
>
> (b) Employing, soliciting, or otherwise causing a merchant or an employee, representative, or agent of a merchant to present to or deposit with a financial institution for payment a credit card transaction record that is not the result of a credit card transaction between the cardholder and the merchant; or
>
> (c) Employing, soliciting, or otherwise causing another to become a merchant for purposes of

[3] There was a second amendment in 2003 that added the current subsection 3, the provision that allows the State to prosecute in the locality where the offense took place or where the victim resides. Laws of 2003, ch. 119, § 4.

> engaging in conduct made unlawful by this section.

Laws of 1993, ch. 484, § 2. Subsection 2 discussed travel agents, and subsection 3 stated it was a class C felony. *Id.* Therefore, Restvedt is mistaken regarding *Jensen*'s comparability analysis to the current version of the statute that did not adopt subsection (1)(a), as he is charged under, until 2003.

Jensen does include a discussion of the history of RCW 9A.56.290. *Jensen,* 32607-1-III at 5. This discussion was unnecessary because the language of the statute is clear on its face regarding lack of comparability to the Oregon statute. *Jensen,* 32607-1-III at 5; Laws of 2003, ch. 52, § 2; Laws of 1993, ch. 484, § 2. If the court believes there is ambiguity, the historical review is of greater value in *Jensen* due to its comparability to the prior version of the statute. *Id*. The comparability elements required, "(1) fraudulent intent, (2) causing the victim to suffer actual monetary damages that exceed $1,000, (3) presenting or

depositing a credit card transaction record to a financial institution that is not a result of a credit card transaction between the cardholder and the merchant." *Jensen*, 32607-1-III at 7, *citing* Laws of 1993, ch. 484, § 2. These elements most closely fall under the current subsection (1)(d). RCW 9A.56.290.

Restvedt's assertion that RCW 9A.56.290(1)(a) is reserved for merchants and others within the financial realm is not supported by the plain language of the statute. When the plain language of the text of RCW 9A.56.290(1)(a) is considered, within the statute as a whole, it is clear the statute has been expanded upon from its initial enactment. RCW 9A.56.290; Laws of 1993, ch. 484, § 2. Where the legislature kept the specific provisions regarding merchants, it used the word merchant, and where it expanded the conduct, it used other words and definitions. RCW 9A.56.280; RCW 9A.56.290; Laws of 1993, ch. 484, §§ 1-2. "A fundamental rule of statutory

construction is that the legislature is deemed to intend a different meaning when it uses different terms." *State v. Roggenkamp,* 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

In *Roggenkamp* the Washington Supreme Court determine that when the legislature chose to use "in a reckless manner" rather than "reckless driving" in the vehicular homicide and assault statutes, it necessarily meant those specific words. *Roggenkamp,* 153 Wn.2d at 625-26. The *Roggenkamp* court reasoned, the legislature could have used reckless driving, another crime within the same statutory scheme, and chose not to, thereby indicating a purposeful choice for use of a different meaning. *Roggenkamp,* 153 Wn.2d at 623-26.

The unlawful factoring statute retained the provision regarding merchants, and then expanded the statute to include other conduct to encompass unlawful factoring. RCW 9A.56.290. The subsection Restvedt was convicted

under does not use the word merchant. The only two subsections that do are (d) and (e). RCW 9A.56.290.

In this matter, the fraudulent transactions were completed by the use of some type of card reader at a merchant establishment to purchase goods with Ms. Stirling's debit card or a card reader at an ATM to access the information on Ms. Stirling's debit card to obtain cash from her bank account. RP 93-94, 100-08, 111, 114-21, 130-33; Ex. 1. This satisfies "uses a scanning devise to access, read obtain, memorize, or store, temporarily or permanently, information coded on a payment card." RCW 9A.56.290(1)(a). A debit card is a payment card. RCW 9A.56.280(11). This action must be done "without the permission of the authorized user of the payment card." RCW 9A.56.290(1)(a). Ms. Stirling testified the transactions she marked were not authorized. RP 93-94, 100-08, 111, 114-21, 130-33; Ex. 1. Nowhere in the statute

does it require the unlawful action to be committed by a merchant.

Further, Restvedt's argument that the dictionary definition of a factor is persuasive that the intent of the statute is designed to only address the unlawful conduct of commercial agents is myopic. AOB at 17. The definition of factoring is "the purchase of accounts receivable from a business by a factor who thereby assumes the risk of a loss in return for some agreed discount." Webster's Third International Dictionary, 813 (2002).[4] The conduct codified as unlawful by the legislature in RCW 9A.56.290 exceeds the narrow confines of the dictionary definition of factoring. Indeed, these definitions are of little use when analyzing

[4] *See also,* What is factoring? Trade Finance, an IJGlobal service. Discussing that factoring is used in the financial sector to buy debt at a discount price, the entity originally holding the debt gets a cash inflow, and the party now owning the debt gets to collect at full price. https://tradefinanceanalytics.com/what-is-factoring (last visited on 12/11/22).

the statutory scheme as a whole and should be given minimal consideration by this Court.

Therefore, Restvedt's assertion that factoring only applies to unlawful transactions by merchants or commercial agents to stop them from defrauding financial institutions by passing of illegitimate transactions, as legitimate business is incorrect. The plain language of RCW 9A.56.290(1)(a) supports the States theory and presentation of evidence, that Restvedt took his then girlfriend's debit card without her permission and made numerous transactions at various merchant establishments and ATM's for goods and money. This Court should affirm Restvedt's convictions for Unlawful Factoring.

Restvedt also argues the record is devoid of any evidence regarding who or what entity was engaged in the alleged unlawful transactions, nor is there any evidence regarding what procedure or device was used to commit

the transactions. AOB 14-15. Yet, Restvedt fails to recognize circumstantial evidence is not considered less valuable evidence, the jury is free to weight it the same as direct evidence. *Delmarter,* 94 Wn.2d at 638; WPIC 5.01.

Ms. Stirling testified she banked with OnPoint, Restvedt did not have access to that account, and he did not have his own debit card on the account, but did have access to her debit card. RP 90-91, 93. Ms. Stirling explained, her debit card is a regular debit card, like a credit card but the printing on the front is not raised, there is a magnetic strip on the back that contains all the information. RP 93-94. The magnetic strip contained her account number and that sort of information. RP 94. Ms. Stirling would either go to an ATM machine and push the buttons, entering the code (PIN), or use the card at a register, where you swipe the card, or insert it into the chip reader, and then push in the numbers to enter your code. *Id*. Generally, you need the debit card and a PIN number, but Ms. Stirling

had made purchases online in the past with only the debit card. *Id.* Restvedt did not have permission to take the debit card and use it over this period. RP 137.

After Ms. Stirling and Restvedt broke up, she reviewed her bank statements, found a large withdrawal she had not authorized, and confronted Restvedt about it. RP 95; Ex. 1. Restvedt told Ms. Stirling, "That was your asshole tax." RP 95. Ms. Stirling also discovered a video of Restvedt made of himself withdrawing the $400 from Security State Bank in Morton. RP 120-21; Ex. 2. Ms. Stirling then went through three months' worth of bank statements and marked all the transactions she knew were fraudulent with an X. RP 98-99; Ex. 1. These were all debit card transactions. Ex. 1. The transactions included withdrawals from ATMs (including ATM fees) and transactions noted as "withdrawal" that are from businesses, such as Silver Creek BU (Buck Stop

Convenience Store) and Mortons Coun (Morton Country Store). RP 105-06, 114, 130-33; Ex. 1.

Ms. Stirling testified these transactions were not authorized; the only person who knew her PIN number and the ability to access her debit card was Restvedt. RP 108, 112, 133, 137. The video of Restvedt at the ATM, his admission to Ms. Stirling and Deputy Humphrey that he took the money from Ms. Stirling as an “asshole tax,” is evidence of Restvedt’s ability to access Ms. Stirling’s debit card and use it without her authorization. RP 95, 237; Ex. 2. Further, Ms. Stirling testified about their habits, and the different locations there were unauthorized transactions, a number of which were the Buck Stop, were frequent stops by Restvedt and not locations Ms. Stirling regularly patronized. RP 105, 115-17, 166, 170, 175, 179. There is also the photograph of Restvedt in the Morton County Market. Ex. 4.

It is disingenuous to state the record is devoid of evidence of who or what entity was engaged or what procedure or device was used. The State is afforded all reasonable inferences from the record in the light most favorable to the State. *Goodman,* 150 Wn.2d at 781. The jury does not leave their common sense at the door, nor do they leave their basic understanding of how the world works. *State v. Balisok*, 123 Wn.2d 114, 119, 866 P.2d 631 (1994). This includes understanding how a debit card is used. The evidence is sufficient to sustain the jury's verdict for Counts 3 through 8, and this Court should affirm.

B. THE STATE CONCEDES THERE ARE DOUBLE JEOPARDY VIOLATIONS FOR COUNTS THREE THROUGH EIGHT, AND THEREFORE, FIVE OF THE CONVICTIONS MUST BE VACATED.

Restvedt argues, arguendo, that if this Court finds sufficient evidence to sustain the convictions that double jeopardy is violated by his identical convictions for counts 3-8. AOB 19-21. Restvedt asserts that all six counts must be reversed. While the State concedes double jeopardy

was violated, it would only require reversal of five of the six counts. Therefore, the State respectfully asks this Court to remand with direction to the trial court to vacate and dismiss counts 4 through 8 with prejudice.

The Fifth Amendment of the United States Constitution and article one, section nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same offense. "In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact." *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998), *citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), *citing Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). Double jeopardy claims may be raised for the first time on appeal.

State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions lack clarity when "the need to find that each count arises from a "'separate and distinct'" act in order to convict" is not expressly stated in the jury instructions. *Mutch,* 171 Wn.2d. at 662; *quoting State v. Berg*, 147 Wn. App. 923, 925, 198 P.3d 529 (2008); *see State v. Carter*, 156 Wn. App. 561, 568, 234 P.3d 275 (2010). When flawed jury instructions are given to a jury, a defendant will *potentially* receive multiple punishments for the same offense, but that does not necessarily mean a defendant has received multiple punishments for the same offense. *Id*. at 663 (emphasis added).

When considering a double jeopardy claim, "review is rigorous and is among the strictest" when a court looks to the entire trial record for consideration. *Id*. at 664. When considering the totality of the court record, if the record lacks clarity that it was "*manifestly apparent* to the jury that

the State [was] not seeking to impose multiple punishments for the same offense," and that each count was based on a separate act, a double jeopardy violation has occurred. *Id*., *quoting Berg*, 147 Wn. App. at 931 (emphasis added by Court in *Mutch*). This can be accomplished by including in the to-convict instruction language that the unlawful conduct in that count is separate and distinct from the unlawful conduct in the other similarly charged counts. *State v. Borsheim,* 140 Wn. App. 357, 364-70, 165 P.3d 417 (2007).

In Restvedt's matter, the to-convict instructions for Counts 3 through 8 all contained the same language,

> To convict the defendant of the crime of unlawful factoring of a credit card or a payment card transaction in Count [III-VIII], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about or between the 15th day of January, 2020 through the 6th day of April, 2020, both days inclusive, the defendant did use a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on a

> payment card without the permission of the authorized user of the payment card, or with intent to defraud the authorized user, another person, or a financial institution; and
>
> (2) That this was a second or subsequent unlawful factoring of a credit card or payment card transaction; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 22-27. The State did include the *Petrich* instruction, WPIC 4.25, requiring the jurors to unanimously agree on the act proved. CP 31. Nowhere in the jury instructions did it require the jurors to determine the conduct for Counts 3, 4, 5, 6, 7, and 8 were separate and distinct from each other. CP 13-39. Therefore, the State concedes double jeopardy

has been violated as to Counts 3 through 8, requiring vacation and dismissal of five of the counts with prejudice.

C. THE TRIAL COURT DID NOT DEPRIVE RESTVEDT OF HIS CONSTITUTIONAL RIGHT TO CONFRONTATION OR HIS RIGHT TO PRESENT A DEFENSE TO THE CRIME CHARGED WHEN IT RULED RESTVEDT COULD NOT IMPEACH MS. STIRLING REGARDING PRIOR NAMES USED.

Restvedt argues the trial court abused its discretion when it erroneously denied him the ability to cross-examine Ms. Stirling regarding her prior names and marital status. AOB at 22-26. Restvedt also asserts the exclusion of this impeachment evidence denied him of his constitutional right to confrontation and his right to present a defense. These claims fail. The trial court's ruling was not an abuse of discretion. Arguendo, any error was cured because the information Restvedt sought to cross-examine Ms. Stirling about introduce was admitted into evidence. This Court should affirm his conviction.

1. Standard Of Review.

A trial court's "limitation of the scope of cross-examination" is reviewed "for an abuse of discretion." *State v. Lee,* 188 Wn.2d 473, 486, 396 P.3d 316 (2017). Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez,* 146 Wn.2d 260, 269, 45 P.3d 541 (2002). (internal quotations and citation omitted).

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State,* 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

2. The Trial Court Did Not Abuse Its Discretion When It Denied Restvedt's Request To Impeach Ms. Stirling With Specific Acts.

The trial court's ruling excluding inquiry on cross-examination regarding Ms. Stirling's last name and marital status was not an abuse of discretion. Even if the trial court's ruling was erroneous, the evidence sought by Restvedt was admitted into evidence, and therefore, he cannot argue that he was prejudiced by the trial court's ruling. This claim is without merit.

The Fourteenth Amendment to the United States Constitution guaranties the State will not deprive a person of their liberty without due process of law. The Sixth Amendment guaranties a criminal defendant the right of confrontation, assistance of counsel, and the compulsory process to help ensure a fair trial. *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013) (citations omitted). The Fourteenth Amendment guaranties that a person accused of a crime has the right to a fair trial. *State v.*

Statler, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied,* 172 Wn.2d 1002 (2011), *citing State v. Davis,* 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). "[T]he right to due process provides heightened protection against government interference with certain fundamental rights." *Id.* (citations and quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore,* 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (quotations omitted). The Sixth Amendment recognizes the defendant's right to control the presentation of their defense. *Coristine*, 177 Wn.2d at 376. A defendant does not, however, have an

absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations, the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, "to assemble and submit evidence to contradict or explain the opponent's case." *Taylor v. Illinois*, 484 U.S. 400, 410-11, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

Restvedt has the independent right, as a person accused of a crime, to confront and cross-examine his accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. A defendant, however, does not have an absolute right to unlimited cross-examination. *State v. Darden*, 145 Wn.2d 616, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination

is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow* 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

When attacking a witness's credibility, it is not permissible to use extrinsic evidence of specific instances of conduct. ER 608(b). A witness may, at the discretion of the trial court, be impeached using specific instances of conduct on cross-examination if the trial court finds the conduct is probative of the truthfulness of the witness. ER 608(b). "The cross-examiner must have a good faith basis for the inquiry, and the court, in its discretion, may require that the basis be revealed in the absence of the jury before the cross-examination is allowed." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, § 608:9 at 315 (2022-2023). Questions asked on cross-examination must be in good faith and with proper foundation. *State v. Briscoe*, 78 Wn.2d 338, 341, 474 P.2d 267 (1970).

Restvedt asserts the trial court abused its discretion when it denied him the ability to cross-examine Ms. Stirling about her use previous use of multiple names and marriage during the time of her relationship with Restvedt. AOB 22-26. Restvedt argues the inability to impeach Ms. Stirling, the State's critical witness, after providing a more than sufficient good faith basis require this Court to reverse his convictions. *Id.* This is simply not accurate. Restvedt's trial counsel's offer of proof was minimal. The information sought was collateral. Further, the information originally denied by the trial court was admitted into evidence during the State's rebuttal. There is no abuse of discretion.

In *State v. Lile,* 188 Wn.2d 766, 398 P.3d 1052 (2017), the State prosecuted Lile for assaulting two strangers while he and his friends walked home from a night of drinking. One of the victims, Rowles, testified he was "not a fighting guy" and that he had never been in a fight. *Lile,* 188 Wn.2d at 782. Lile sought to cross-examine

Rowles regarding harassment petitions his ex-girlfriend had filed against Rowles. *Id.* at 772-73. The trial court found the allegations made in the petition were not relevant to Rowles' credibility and that they were collateral. *Id.* at 773. Lile argued on appeal that it was reversible error to deny his ability to cross-examine Rowles regarding harassment petitions. *Id.* at 782.

The Washington Supreme Court noted that specific acts might be inquired at the discretion of the trial court if they are probative for truthfulness. *Id.* at 783, *citing* ER 608(b)(1). "In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness' veracity on the stand and whether it is germane or relevant to the issues presented at trial." *Id.*, *quoting State v. O'Connor,* 155 Wn.2d 335, 349, 119 P.3d 806 (2005). The *Lile* court found the trial court's ruling to be a close call, but held the trial court did not abuse its discretion. *Id.* at 784.

The *Lile* trial court had discussed that the offer of proof included the information contained in Rowles latest protection order. *Id.* at 785. The trial court stated it did not find enough relevance or connection between the conduct asserted in the order and the conduct asserted in Lile's matter. *Id.* at 786. There were no accusations of fighting in the protection order allegations. *Id.* The trial court also found the petition for the protection order "did not contain specific allegations of dishonesty by Rowles." *Id.* The *Lile* court held it was reasonable for the trial court to find the allegations in the protection order collateral and irrelevant to credibility. *Id.* at 786-87. The *Lile* court also stated, "We need not agree with the trial court's decision for us to affirm that decision. We must merely hold the decision reasonable." *Id.* at 782.

Restvedt's counsel told the trial court that Ms. Stirling had used a number of different names in the past, had been previously (or currently) married, and kept that

information from Restvedt, which ultimately resulted in a confrontation and the end of their relationship. RP 138-39. The trial court, in an attempt to preempt the need to constantly send the jury in and out, asked Restvedt's counsel what specific questions he intended to ask Ms. Stirling. RP 139. Restvedt's counsel replied, "Other - - when she started using the name Stirling, why, and if she has gone by other names. And I'm going to be asking her if she's currently married. And that's it." *Id*. The State argued those question elicited testimony regarding a collateral matter and not relevant. RP 139-40.

Next, there was an exchange between the trial court and Restvedt's counsel regarding relevance, whether the information sought was collateral or actual impeachment. RP 140-43. The trial court asked, "How id changing a person's name - - how does that relate to dishonesty?" RP 140. Restvedt's counsel stated the central focus of the case is credibility. *Id*. The trial court replied, "Again, how is

that related to credibility?" *Id*. Restvedt's counsel replied, "because this case comes down to her word against my client's word, and that's what it's going to be. And what I'm trying to show is her veracity or lack thereof." *Id*. The trial court responded, "By changing one's name? I'm not seeing the connection between changing one's name and - - or having different names and being a dishonest person or how that affects your credibility. I'm not seeing the connection, if you can explain that to me." *Id*. The trial court was struggling to understand how the act of changing a name was related to dishonesty, which is what is required for the line of questioning to fall under ER 608(b).

In an attempt to explain his position how the information was tied to credibility, Restvedt's trial counsel answered,

> And if she answers truthfully to what my client may testify to, no harm, no foul. But I don't anticipate that she's going to give me the answers that I anticipate are truthful and my client is going to testify, and it comes down to the jurors being able to weigh credibility

> between the alleged victim and my client. That's what this case comes down to.

RP 140-41. The trial court then replied, asking how would that test not be collateral, "classic collateral evidence - - a trial within a trial." RP 141. The trial court inquired, "How do we resolve that if she says she did and he says she didn't or vice versa?" *Id*. Restvedt's counsel replied, "Well, you know, quite honestly, Your Honor, I'm just trying to make her look like a liar. That's the bottom line." *Id*. The trial court agreed that making the victim, or any witness, look like a liar is a valid trial strategy. *Id*. The trial court also stated, "I'm just not seeing - - I'm just trying to follow, linearly, how you get there be asking her - - let's play out the scenario." *Id*. Restvedt's counsel agrees he had nothing to confront Ms. Stirling with if she denies any of his questions. RP 142. The State then argued again that the matter is collateral. RP 142-43.

The State acknowledges the trial court stated that credibility is always an issue before the jury. RP 143. The

trial court also determined that without a better offer of proof than the defendant's statements to his attorney that the complaining victim has changed her name and was married the matters were collateral. *Id*.

This Court does not need to agree with the trial court's decision; it only must find it reasonable. It is reasonable that with only an offer of proof from the defendant that the victim had prior names she used and was married, that the issues were collateral. Further, the line of questioning is not probative of truthfulness. The information cannot be used for substantive value; it can only be used for impeachment to show the witness is deceitful. ER 608(b). It is difficult to see how asking if a person had changed one's name could satisfy this inquiry.

Further, Restvedt ultimately was allowed to cross-examine Ms. Stirling regarding her name. Additionally, testimony was offered regarding Ms. Stirling's marital status. During the State's rebuttal, Ms. Stirling explained

she was married from 1995 until 2004. RP 289. Ms. Stirling stated she has not been married since 2004, and, therefore, was not married while dating Restvedt. RP 290.

Restvedt asserts this information does not cure that Restvedt's "counsel had been prevented from asking whether [Ms. Stirling] had used other names in the past, including a married name, all of which she also kept from the defendant during the time of their relationship." AOB at 25-26. Restvedt also argues this requires reversal. Yet, Restvedt fails to acknowledge that his counsel cross-examined Ms. Stirling during the State's rebuttal. The exchange went as follows:

> Q. Ms. Stirling, how long have you been using the name Stirling?
>
> A. I want to say - - I'm thinking around 20 years.
>
> Q. Okay. and how did you get the name Stirling?
>
> A. I chose it and I went through the court system to change it.

Q. Just, you liked it and you wanted to change your name?

A. It has family heritage.

Q. So you chose it - -

A. Yes.

Q. - - and you just decided to change your name?

A. Yes.

Q. Okay.

RP 290-91.

Therefore, during the State's rebuttal the following information was furnished to the jury, 1) when Ms. Stirling started using the name Stirling, 2) why Ms. Stirling started using Stirling, and 3) when she was married and to whom. RP 139, 289-91. This testimony supplied three of the four inquires Restvedt's counsel wanted to explore with Ms. Stirling when asked for the ability to impeach her originally. RP 139. Restvedt's counsel had also stated during his initial request that he wanted to ask if Ms. Stirling had gone

by any other names. RP 139. Since Ms. Stirling has been using Stirling for 20 years, it can be argued that other names are not relevant. ER 401. Therefore, even if there was error by the trial court and it abused its discretion when it made its initial decision, any erroneous decision was harmless because the requested evidence was admitted to the jury. This Court should affirm.

Additionally, Restvedt asserts the trial court's erroneous ruling regarding impeachment violated his constitutional right to present a complete defense. AOB 26-28. Restvedt cannot argue his constitutional rights were violated when the very evidence he sought to have admitted were later submitted to the jury during the State's rebuttal. There was no error and this Court should affirm.

D. THE DEPUTY PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENT CALLING INTO QUESTION STATEMENTS MADE BY RESTVEDT DURING HIS TESTIMONY WERE NOT ERROR, AND THEREFORE, THE CLAIM OF PROSECUTORIAL ERROR FAILS.

Restvedt claims the deputy prosecutor committed prosecutorial error (misconduct)[5] by improperly shifting the burden of proof. AOB at 28-34. The deputy prosecutor did not shift the burden, but rather questioned the evidence Restvedt chose to present to the jury. Therefore,

[5] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007)*; State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

Restvedt's claim of prosecutorial misconduct fails and this Court should affirm his convictions.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor's Statements During Closing Argument Did Not Shift The Burden Of Proof.

To prove prosecutorial error, it is the defendant's burden to show the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). There are two standards of review for prosecutorial error, one if the defendant objected at trial and a heightened standard if the defendant failed to object. *State v. Emery*,

174 Wn.2d 741, 760, 278 P.3d 653 (2012). If a defendant objects to the alleged error, the inquiry is whether the error "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Emery,* 174 Wn.2d at 760 (internal citations omitted).

In contrast, a defendant's failure to object waives the alleged error, "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61*, citing State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). A defendant is required to show the reviewing court, "(1) no curative instructions would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 761 (internal quotations and citations omitted).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may

freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

A prosecutor commits prosecutorial error when they shift the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor may commit error during closing argument by minimizing or misstating the law regarding the burden of proof. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011).

Restvedt asserts the deputy prosecutor mischaracterized his testimony and committed error by burden shifting in during the State's closing argument by stating:

> So you have to balance that against - - oh, yeah, there's this nonsense about her being

> married. He's the one that broke up because he found out she had been married. Really?
>
> Two things. One, it can't be true, because it would have been easy to find out; right? I mean, he could have gotten a marriage certificate somewhere and - -

RP 320. Restvedt's counsel objected, the trial court sustained, and the deputy prosecutor continued with his closing. RP 320. The deputy prosecutor argued,

> Picture that argument they had. All right? Ms. Stirling says that the argument was over him taking money from her without her permission. He says the argument was over the fact that, wow, she has been married and he didn't know about it.
>
> Which one of those is more reasonable? Which one of those, balanced against your experience, is the more reasonable one? Which one would be easier for the other party - -the other party, at the time to look into regarding their version of the argument?
>
> She said she changed her name at one point. A lot of people who get divorced changed their name afterwards. That's not uncommon at all.

RP 320-21. The deputy prosecutor then argued that the balance of the evidence supports Ms. Stirling's recollection

of the events. RP 321. There is nothing improper with the deputy prosecutor's argument, nor is it a mischaracterization of Restvedt's testimony.

Restvedt testified that he learned towards the end of his relationship with Ms. Stirling that she was married. RP 270. According to Restvedt, he asked Ms. Stirling about her currently being married, the confrontation did not go well, it was volatile and Ms. Stirling denied everything. RP 270. Restvedt stated that was the end of their relationship. RP 270. The deputy prosecutor's statements were not a mischaracterization of the evidence.

Next, Restvedt cites to *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), to support his contention that the prosecutor's committed misconduct because a defendant has not duty to present evidence, and it is the State that bears the burden. AOB at 29. Unlike Restvedt, in *Fleming* the defendant's did not testify. *Fleming,* 83 Wn. App. 212. The *Fleming* court held that the State had the

burden of proving all the elements of the charged crime beyond a reasonable. *Id.* at 215. The *Fleming* court also held that "[t]he prosecutor's infringed on the defendants' constitutionally guaranteed right to remain silent." *Id.* The deputy prosecutor's comments cannot be seen as commenting on Restvedt's constitutional right to remain silent; he gave that up by testifying.

It is recognized that when a defendant choses to put on a case, they are not shielded from the prosecutions attack. *State v. Vassar,* 188 Wn. App. 251, 260, 352 P.3d 856 (2015). "'When a defendant advances a theory exculpating her, the theory is not immunized from attack. On the contrary, supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.'" *Vassar,* 188 Wn. App. at 260, *citing State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

In *Vassar*, the defendant was prosecuted for motor vehicle theft. *Id.* at 253. Vassar testified during the trial, "bring up an alleged forged bill of sale." *Id.* at 261. The deputy prosecutor argued Vassar failed to present evidence that corroborated her testimony. *Id.* at 259. Vassar asserted her case was similar to *Fleming,* 83 Wn. App. 212*. Id.* at 260. The *Vassar* court disagreed. *Id.* at 260-61. "*Fleming* does not stand for the proposition that the State may never comment of a defendant's failure to produce evidence." *Id.* at 261. The *Vassar* court held, "A prosecutor is allowed to comment on the evidence presented; this includes commenting on whether [the defendant's] version of events was supported." *Id.*

The deputy prosecutor's statements during his closing argument commented on whether Restvedt's version of the evidence was supported. RP 319-20. Even though the trial court sustained the objection by Restvedt's counsel for burden shifting, according to *Vassar* the

statements would not qualify as such. Restvedt decided to put on a defense, including stating he discovered Ms. Stirling was married while they were dating. RP 270. According to Restvedt, this information was the impetus for a confrontation between himself and Ms. Stirling and that was the reason for the end of their relationship. RP 270-71. This piece of testimony was part of the argument used to promote the idea that Ms. Stirling was really just a vindictive woman scorned, and not a victim of Restvedt's fraudulent behavior and theft. RP 329, 333. This is subject to adversarial testing.

Restvedt does not get to testify, assert a defense to the jury, and then expect to hide from examination and argument from the prosecution regarding evidence, or lack thereof, submitted to the jury. The deputy prosecutor is allowed to comment on Restvedt's failure to produce evidence to support his version of the events. Additionally, it is permissible for a deputy prosecutor to ask the jury to

review the submitted evidence and ask which version of the events is more reasonable. *Vassar,* 188 Wn. App. at 260-61. There was no prosecutorial error and this Court should affirm the convictions, with the exception of the State's above concession regarding double jeopardy.

E. CUMULATIVE ERROR DOES NOT APPLY.

Restvedt also argues there is cumulative error requiring reversal of his convictions. AOB at 32-34. The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). Restvedt predominately reargues his claim that the trial court's ruling limiting his cross-examination of Ms. Stirling hobbled his defense, prejudiced him, resulting in an unfair trial. AOB at 32-34.

The State has previously addressed Restvedt's arguments. The State conceded the double jeopardy claim. The remaining alleged errors are without merit, and therefore, cumulative error does not apply.

IV. CONCLUSION

The Unlawful Factoring of Credit Card or Payment Card Transactions, RCW 9A.56.290(1)(a) applies to Restvedt's conduct. As such, the State presented sufficient evidence to sustain a conviction for Unlawful Factoring of Credit Card or Payment Card Transactions. The State concedes five of the six convictions for Unlawful Factoring must be vacated and dismissed with prejudice due to double jeopardy violations. The deputy prosecuting attorney did not commit prosecutorial error. There is no cumulative error. With the exception of the State's concession, this Court should affirm Restvedt's remaining convictions and remand for vacation of the five Unlawful Factoring counts and resentencing.

This document contains 8,967 words, excluding the parts of the document exempted from the words count by RAP 18.17.

RESPECTFULLY submitted this 21st day of December 2022.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

December 21, 2022 - 4:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56856-0
Appellate Court Case Title:	State of Washington, Respondent v. Troy C. Restvedt, Appellant
Superior Court Case Number:	20-1-00441-8

The following documents have been uploaded:

- 568560_Briefs_20221221155929D2077696_6349.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Restvedt.tro Response 56856-0.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- oliver@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Lori Jendryka-Cole - Email: lori.cole@lewiscountywa.gov
Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email:)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20221221155929D2077696